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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 108

HARRY EDISON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 44–52) are not reported. The opinion of the Circuit Court of Appeals (R. 66–77) is reported at 148 F. 2d 810.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 23, 1945. (R. 78.) The petition for a writ of certiorari was filed June 5, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Tax Court erred in holding that, under Section 22 (a) of the Revenue Act of 1938 and of the Internal Revenue Code, petitioner, the grantor, is taxable on the income from two long-term trusts under which he retained broad administrative powers over the trust corpora and such control over the distribution of trust income and corpora as enabled him to shift beneficial interests in the trusts as between members of his family group.

STATUTES AND REGULATIONS INVOLVED

The applicable statutory provisions are set forth in the Appendix, *infra*, p. 17.

STATEMENT

The facts as summarized by the Tax Court (R. 44–48) are as follows:

Petitioner is the father of two children, Sidney J. Edison, born August 1, 1915, and Edna L. Edison, born June 15, 1920. The son has lived in New York City since 1935, and was married in 1940. During the taxable years, 1938 to 1941, inclusive, the daughter was unmarried and lived with her parents in St. Louis. (R. 45.)

On May 24, 1938, petitioner executed two irrevocable trusts, one for the benefit of each child, with himself as sole trustee. The corpus of each trust consisted of 2,500 shares of common stock of Edison Brothers Stores, Inc., and, in addition, he transferred to the trust for his daughter 25

shares of common stock of Mercantile Commerce Bank and Trust Company of St. Louis. On June 18, 1940, petitioner added to the corpus of the trust for his son 2,500 additional shares of common stock of the Edison Company, and on December 16, 1941, he added to the daughter's trust an additional 2,000 shares of that stock. (R. 45.)

On May 24, 1938, just prior to the transfer to the two trusts of the 5,000 shares originally constituting the trusts, petitioner owned 40,576 shares ot the common and 50 shares of the preferred stock of the Edison Company, out of 385,490 shares of common and 60,000 shares of preferred stock then outstanding. On June 18, 1940, just prior to the transfer of the additional 2,500 shares to the son's trust, petitioner owned 35,301 shares of common stock and 50 shares of preferred. On December 16, 1941, just prior to the transfer of the additional 2,000 shares to the daughter's trust, petitioner owned 32,876 shares of common and 50 of preferred. The stock was listed on the New York Stock Exchange. (R. 45.)

During the taxable years, 1938 to 1941, inclusive, petitioner was the president and a director of the Edison Company, which is a Delaware corporation engaged in the operation of retail shoe stores throughout the United States, with principal offices in St. Louis. (R. 44.) Petitioner's salary, the amount of dividends received from that corporation, and his net income disclosed by his

income tax returns for the years in question, were as follows (R. 44):

Year	Salary	Dividends	Net Income
1938	$33,915.05	$45,925.00	$76,368.27
1939	35,915.05	44,420.00	75,737.48
1940	32,323.54	50,576.50	80,654.43
1941	32,323.54	55,014.20	116,430.44

Petitioner reported the gifts to the trusts at the following values: The 2,500 shares of Edison stock given to each trust in 1938 at $25,000; the 2,500 shares given to the son's trust in 1940 at $27,500; and the 2,000 shares to the daughter's trust in 1941 at $27,000. (R. 45.)

Under each trust petitioner's wife and two brothers were named as successor trustees in the event of petitioner's death or resignation, or his refusal or inability to act, as trustee, but petitioner reserved unto himself, at any time and from time to time during his lifetime, the right and power to designate a trustee or trustees to act in lieu of the named successor trustees. (R. 14.)

Each of the two trusts contained spendthrift clauses and the following provision (R. 47–48):

> 3. The Trustee shall hold, possess, manage and control the said trust estate and every part thereof, with full power to sell, transfer, convey, dispose of, rent, lease, mortgage, pledge, encumber, invest, and reinvest the same, upon such terms and in such manner as to the said Trustee shall seem meet and proper; to receive, collect, sue for and recover the principal of the

same, and the rents, dividends, interest, income, issues and profits thereof.

It is not intended to limit the Trustee in investing the assets of the trust estate to what are commonly denominated as "legal investments for trustees", but on the contrary to give said Trustee full and plenary powers of investment such as he would possess if he were the absolute owner of the "trust estate" in his private individual capacity.

The Trustee is hereby given full power and authority to invest and reinvest all or any part of the said trust estate which may come into his hands, in such a manner and in such bonds, stocks, notes, real estate mortgages or other securities or other property, personal or real, and upon such terms and for such length of time, as to the Trustee shall seem meet and proper; it being intended hereby to give unto the said Trustee full and complete authority to hold, possess, manage, control, sell, convey, dispose of, encumber, lease, invest and reinvest the whole and every part of the said trust estate, according to his sole judgment and discretion, and his powers and authority so to do shall not be limited or restricted to securities of the character authorized or permitted as suitable for the investment of trust funds by statutes or decisions of courts pertaining thereto or by any implication therefrom.

The Trustee shall have full power without accountability for loss (whether through

depreciation in value or otherwise), to retain at his discretion as investments of the trust estate any or all property, personal or real, that may come into his hands either at the beginning of this trust or at any time thereafter.

The Trustee shall have the power to determine whether any money or property coming into his hands shall be part of the capital or corpus of said trust estate or part of the income therefrom and to apportion between such capital and income any loss or expenditure in connection with such trust estate which in his opinion should be apportioned in such manner and division as to him may seem just and equitable.

The Sidney J. Edison trust indenture provided that the trustee, during the lifetime of the son, Sidney, should, in quarterly or other convenient installments, pay over to him all or such portion of the net income of the trust as the trustee in his uncontrollable discretion shall think advisable or necessary for his comfort, support, education, or ease, or that the trustee should, either directly or through some person selected by him for that purpose, use or apply all of such net income or so much thereof as in his uncontrollable discretion he shall deem sufficient for the comfort, support, education or ease of the son. Any portion of the income not thus paid over, used or applied was to be added to the corpus of the trust fund. (R. 46.)

Similar provisions authorized encroachment upon the corpus of the trust in such amounts as the trustee, in his uncontrollable discretion, should deem advisable or necessary for the greater ease or comfort of Sidney, or for his business training, or to help him start in business or some other vocation or profession, or for his education, maintenance or care. If all of the corpus is thus paid, used or applied, the trust is to cease and terminate. (R. 46; see also R. 9.)

Provision was made for the continuance of the trust after the death of Sidney. (R. 47.) If Sidney died leaving issue, the trust fund was to be held for his child or children *per stirpes,* until each reached the age of 21 years. Until such time, the trustee could, in his discretion, use the trust income from the share of each such child for the child's support, benefit, education, ease or comfort. If the child died before reaching 21 years, the portion held in trust for him was to go to his heirs pursuant to the intestacy laws of Missouri. On the other hand, if Sidney died without issue, the trust fund was to be held for his sister Edna during her lifetime, during which both income and corpus could be paid out to her in the same manner as it could be paid to Sidney before that time, and at her death her issue were to take in the same manner as any issue of Sidney would have taken. If Edna predeceased

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Sidney, her issue were to take as if she had survived Sidney and then died. If Edna predeceased Sidney and neither left issue, the whole was to go to Sidney's heirs under the intestacy laws of Missouri. (R. 9–12.)

The trustee had power to determine whether any money or property coming into his hands should be part of the corpus of the trust or part of the income therefrom. (R. 13–14.)

The trust for petitioner's daughter Edna differed from that for Sidney only in the following material respects: It provided that until she shall attain her majority, "the Trustee shall permit the net income of said trust to accumulate and as it accumulates it shall become part of the corpus of the trust." After she attained her majority, the net income was to be distributed to her under provisions which were the same as those set out in the trust for Sidney. As in Sidney's trust, provision was made for the continuance of the trust after her death, with or without issue, with Sidney and his issue named as alternative beneficiaries in the event Edna died without issue. (R. 17–23, 48.)

Petitioner has acted as sole trustee since the establishment of the trusts and, as such, has filed fiduciary income tax returns for each of the years here in question, reporting the following data (R. 46):

SIDNEY J. EDISON TRUST

	Dividends received	Income distributed	Undistributed income	Tax paid
1938	$2,510.00		$2,510.00	$96.40
1939	3,175.00	$1,400.00	1,757.35	66.29
1940	6,310.00	2,132.06	4,167.07	181.90
1941	8,568.00	[1] 3,166.25	5 349.98	672.50

[1] Distributed to beneficiary.

EDNA L. EDISON TRUST

	Dividends received	Undistributed income	Tax paid
1938	$2,585.00	$2,585.00	$99.40
1939	3,400.00	3,400.00	131.27
1940	4,110.00	4,110.00	174.75
1941	5,638.00	5,638.00	712.65

The income received by petitioner as trustee of these trusts was kept by him in separate bank accounts. (R. 46.)

Petitioner retained such control over the property of the trusts as to remain substantially the owner thereof for tax purposes. (R. 48.)

On the basis of these facts, the Tax Court held petitioner taxable on the income from the trusts under the doctrine of *Helvering* v. *Clifford,* 309 U. S. 331. (R. 48–52.) The Circuit Court of Appeals affirmed the decision of the Tax Court. (R. 66–77.)

ARGUMENT

This case, like *Stockstrom* v. *Commissioner,* 148 F. 2d 491 (C. C. A. 8th) and *Hamburger* v. *Commissioner,* 147 F. 2d 856 (C. C. A. 6th), similar cases pending on petitions for writs of certiorari Nos. 96, 94, October Term, 1945), is governed by

the doctrine established by this Court in *Helvering* v. *Clifford,* 309 U. S. 331. See also *Helvering* v. *Stuart,* 317 U. S. 154; *Hormel* v. *Helvering,* 312 U. S. 552; *Helvering* v. *Richter,* 312 U. S. 561. Application of the *Clifford* doctrine to the particular circumstances of the case called for an evaluation of numerous evidentiary facts bearing upon the extent of the control retained by petitioner, the grantor, over the trust corpus and income, in order to determine whether, in substance, he was still to be treated as the owner for the purposes of Section 22 (a) of the Revenue Act of 1938 and of the Internal Revenue Code (Appendix, *infra,* p. 17). This Court has indicated that the process of applying the *Clifford* doctrine to specific facts is peculiarly within the province of the Tax Court. *Dobson* v. *Commissioner,* 320 U. S. 489, 491, rehearing denied, 321 U. S. 231; *Helvering* v. *Clifford, supra,* pp. 336, 338; *Harrison* v. *Schaffner,* 312 U. S. 579, 583–584; *Helvering* v. *Stuart, supra,* pp. 167, 169; see also *Hormel* v. *Helvering, supra,* p. 560; *Helvering* v. *Richter, supra,* p. 562. The court below recognized this (R. 77) and stated (R. 76):

> * * * we cannot say—as we could not in the *Stockstrom* and *Funsten* cases—that the Tax Court's appraisal of petitioner's powers of control here, in the light of the relationships involved, the donor's general scheme of family economics, and the results

> to him in the particular situation, is without a rational basis of taxability under section 22 (a).

Under the circumstances, affirmance of the Tax Court's decision was the only proper course. *Trust u/w of Bingham* v. *Commissioner,* No. 932, last Term, decided June 4, 1945, not yet reported; *Commissioner* v. *Estate of Bedford,* No. 710, last Term, decided May 21, 1945, not yet reported; *Commissioner* v. *Scottish American Co.,* 323 U. S. 119; *Dobson* v. *Commissioner, supra.*

Petitioner is incorrect in asserting (Br. 26–27) that the decision below is in conflict with Sections 161, 162 and 167 (c) of the Internal Revenue Code (26 U. S. C., Sec. 161, 162 and 167). Although those sections relate to the taxation of trust income, as petitioner states, it is of the very essence of the *Clifford* doctrine that taxability to the grantor may nevertheless be predicated upon Section 22 (a). See *Helvering* v. *Clifford, supra,* pp. 337–338; *Helvering* v. *Stuart, supra,* pp. 168–169; *Helvering* v. *Wood,* 309 U. S. 344; *Hormel* v. *Helvering, supra; Brown* v. *Commissioner,* 131 F. 2d 640 (C. C. A. 3d), certiorari denied, 318 U. S. 767; *Hall* v. *Commissioner* (C. C. A. 10th), decided July 2, 1945 (1945 P–H, par. 72,608).

Contrary to petitioner's contention (Br. 20–24), there is no conflict in Circuit Courts of Appeals decisions. None of the cases petitioner cites in-

volved trusts under which the grantor retained power to shift beneficial interests in the trust.[1] In the instant case petitioner had complete control over the distribution of both income and corpus during the lifetime of the primary beneficiary, as well as control over the distribution of income afterwards, could pay out such amounts to the primary beneficiary as he saw fit and thus decrease or increase the shares of the remaindermen and primary beneficiary or cut off either alto-

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[1] In *Commissioner* v. *Armour*, 125 F. 2d 467 (C. C. A. 7th), and *Commissioner* v. *Branch*, 114 F. 2d 985 (C. C. A. 1st), the trust income was currently payable to the beneficiary and the grantor had no power to accumulate it. In *Armstrong* v. *Commissioner*, 143 F. 2d 700 (C. C. A. 10th), the trust income was to accumulate and become part of the corpus and the grantor had no power to pay it out before the termination of the trust. In *Commissioner* v. *Katz*, 139 F. 2d 107 (C. C. A. 7th), and *Jones* v. *Norris*, 122 F. 2d 6 (C. C. A. 10th), the grantor had power to accumulate the income or pay it out but, if accumulated, the same beneficiary got it later, in the first case when the beneficiary reached the age of 25 years and in the second case at the termination of the 20-year trust. In *Phipps* v. *Commissioner*, 137 F. 2d 141 (C. C. A. 2d), the grantor had discretionary control over the income, but the court stated that the grantor's wife, who was a beneficiary and had an adverse interest, was one of the trustees and the grantor could control the income only through a disregard of the purposes of the trust—a disregard which would result in judicial intervention. Thus, the decision was predicated on the view that the local courts would have been an effective check upon the grantor's control of the income.

gether.[2] This distinction is an important one (see *Foerderer* v. *Commissioner,* 141 F. 2d 53 (C. C. A. 3d)), for, as this Court has stated, the power to dispose of income is equivalent to ownership of it and the exercise of that power to procure payment to another is the enjoyment and realization of the income by him who exercises it. *Helvering* v. *Horst,* 311 U. S. 112, 118; see also, *Corliss* v. *Bowers,* 281 U. S. 376, 378; *Harrison* v. *Schaffner,* 312 U. S. 579, 581. Moreover, in four of the cases cited by petitioner the decision of the Tax Court was affirmed [3] and, consequently, the cases could, at most, be but examples of inconsistencies of the Tax Court rather than conflicts justifying review by this Court; and, as the court below pointed out, there is no such inconsistency (R. 76–77). In addition, two of the cases,[4] one in which the Tax Court's decision was reversed, are decisions of the Circuit Court of Appeals for the Tenth Circuit which in a later decision (*Hall* v. *Commissioner, supra*) specifically recognized that the power to shift ben-

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[2] In the Edna Edison trust the income was to be accumulated during Edna's minority and added to principal, but the income could be paid out to Edna as principal. (See R. 70–71.)

[3] *Commissioner* v. *Armour, supra; Commissioner v. Branch, supra; Commissioner* v. *Katz, supra; Jones* v. *Norris, supra.*

[4] *Jones* v. *Norris,* supra; *Armstrong* v. *Commissioner, supra.*

eficial interests results in economic gain to the grantor and warrants taxing the grantor on the trust income. The conclusion in the *Hall* case that the grantor was not taxable on the trust income resulted from the fact that the court found no power in the grantor to shift beneficial interests, the accumulated income being payable to the primary beneficiary 15 years after the creation of the trust.

Nor is petitioner correct in asserting (Br. 18–20) that the decision below conflicts with the decision of this Court in *Helvering* v. *Stuart, supra.* While the Court stated in that case that "economic gain realized or realizable by the taxpayer is necessary to produce a taxable income under our statutory scheme" (p. 168), it was also stated that (pp. 168–169):

> economic gain for the taxable year, as distinguished from the non-material satisfactions, may be obtained through a control of a trust so complete that it must be said the taxpayer is the owner of its income. So it was in *Helvering* v. *Clifford,* 309 U. S. 331, 335, 336. Cf. *Helvering* v. *Fuller,* 310 U. S. 69, 72 note 1, 76.

The decision below, as already stated, is based on the conclusion that taxpayer did retain such control of the trust as, in substance, to constitute himself the owner of it. That conclusion is not

erroneous because of the impossibility of reversion to the grantor, for the *Stuart* decision makes it plain that while that is a factor pointing to divestment of control it is not conclusive. (P. 169.)

Petitioner's contention that to tax him on the income from these trusts violates provisions of the Constitution and of amendments thereto (Br. 15–18) is inapposite. He argues that it is a denial of due process of law to tax one person upon the profits and gains of another. (See Br. 18.) Here, as in the *Clifford* case, the tax is levied upon income which in substance and reality is that of this taxpayer and not of another. See *Burnet* v. *Wells*, 289 U. S. 670, 678, 679. The fact that there was an otherwise valid anticipatory assignment of income is no more material here than it was in the *Clifford* case.[5]

The case does not present an issue of law calling for review. A similar petition for certiorari was denied last term in *George* v. *Commissioner*, 143 F. 2d 837 (C. C. A. 8th), certiorari denied, 323 U. S. 778.

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[5] See also *Commissioner* v. *Harmon*, 323 U. S. 44; *Helvering* v. *Eubank*, 311 U. S. 122; *Higgins* v. *Smith*, 308 U. S. 473; *Griffiths* v. *Commissioner*, 308 U. S. 355; *Helvering* v. *Horst*, 311 U. S. 112; *Burnet* v. *Leininger*, 285 U. S. 136; *Corliss* v. *Bowers*, 281 U. S. 376; *Lucas* v. *Earl*, 281 U. S. 111.

CONCLUSION

The decision below is correct and involves no conflict of decisions or important question of law to be resolved. The petition for a writ of certiorari therefore should be denied.

Respectfully submitted.

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SEPTEMBER 1945.